

A Voice From the Wilderness, Calling Your Name

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Four great ideas in United States environmental law have caught on in other countries. The National Park idea, first implemented in 1872 with the creation of Yellowstone National Park, reverberated around the globe. New Zealand created the second national park in 1887 when Maori chieftains asked that certain land be protected by the Crown against white colonization and exploitation. In the last century, dozens of countries have created National Parks and reserves, from the summit of Mt. Everest to the depths of the Rift Valley in Kenya. The United Nations has intensified this effort still further by creating and recognizing the notion of World Heritage Areas.

The second great idea is exemplified by the proverb "look before you leap," which is embodied in the National Environmental Policy Act. Dozens of countries now have laws or procedures requiring Environmental Impact Statements (EISs). Such EISs are now mandated by the European Community, strongly encouraged by United Nations guidelines, and written into the procedures of the World Bank and other bodies, whose past or present policies are responsible for much of the environmental devastation in the world. But just as EISs can be a tool for truth, they can be a tool for fraud. In many countries, EISs are written by the very companies proposing the projects. In the state of Tasmania, Australia, the guidelines are even kept secret from the public. In the United States, the process can be more subtle. Although the government prepares the EIS using public guidelines, but it can hide and distort data by burying it under a layer of bureaucratic double talk.

The third great idea in environmental law is freedom of information. The public records laws adopted over one hundred years ago by our state legislatures were models for the Federal Freedom of Information Act of 1966. Similar laws can be found in Canada, some of the states of Australia, much of Europe, and many other countries. Lest we be too smug about our role when advocating these laws, we should realize that Sweden has had a freedom of information law for two centuries. In all nations,

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citizens have to battle for their right to government documents; but at least the theoretical right is spreading.

Environmental and freedom of information laws are meaningless if government officials cannot be called to account when they violate these laws. This brings us to the fourth great idea—citizen lawsuits. Corporate America has long had the right to sue federal agencies under the Administrative Procedure Act. Citizens, however, have had to stand on the sidelines, as the waters were fouled and forests were chopped down. In 1972, Supreme Court Justice William O. Douglas, a product of the heart-achingly beautiful Pacific Northwest, asked in a dissenting court opinion the question posed by California law professor Christopher Stone, "Should trees have standing?" That is, should trees, rivers, and species have the right to be represented in court when the laws are being violated and species are being endangered? Justice Douglas lost that battle, but won the war. During the 1970s, Congress rewrote the nation's air pollution, water pollution, and endangered species laws. It sharply strengthened those laws and added provisions allowing citizens to file suits against both polluters and federal agencies that violate the law. Congress thus felt that citizens would perform a public service by motivating governmental agencies to act through the threat of such suits.

In addition to these statutory changes, courts began granting ordinary citizens the right to sue to protect natural areas under the Administrative Procedure Act. Judges, lawyers, and legislators in many other countries are also searching for ways to open up their legal systems to provide access to ordinary citizens. For example, citizen suit provisions are included in the Clean Water Act of Papua, New Guinea, and in India's Environmental Protection Act of 1986. The 1976 Constitution of the Soviet Union also contains this type of provision; it was recently implemented to stop the secret dumping of radioactive waste in a community near Moscow. Similarly, in early April, 1989, the National Peoples Congress of the Peoples Republic of China voted to give citizens the right to sue government officials who violate the law.

Meanwhile, the parallel liberalization of standing to sue has marched forward in places as diverse as Canada, Australia, and India. In fact, India has probably gone the furthest of all, certainly further than the United States. It has abolished the Anglo-American notion of standing in public interest litigation

and accepted as a valid court complaint even the anguished plea of an injured citizen scrawled on a postal card.

Just as the rest of the world is rapidly expanding its environmental laws, however, America may be poised to drop out of the race. Democratic Congressman Les AuCoin, Democratic Governor Neil Goldschmidt of Oregon, Republican Senators Mark Hatfield and Bob Packwood of Oregon, and Republican Senator Slade Gordon of Washington have each said that environmental disputes relating to forests do not belong in the courts. They have each endorsed proposals for the preclusion of judicial review. This legislation would remove the right of citizens to sue the federal government in matters involving the timber industry in the Pacific Northwest. This action, which would severely affect citizens' legal rights, reminds me of a line from *The Mikado*:

I've got a little list—I've got a little list.
Of societies offenders who might well be underground,
And who never would be missed—who never would be missed.
They're just environmentalists,
We can do it with no risk!

We know that citizen suits must have been successful in order to engender such a proposal. But we must ask, how important are suits by "grass roots" citizens to the cause of environmental protection? Can the national groups set the agenda adequately and do the work that needs doing, or is the problem too big for them alone? In fact, how big is the problem?

I will focus on one aspect of the problem: forests, both temperate and tropical. In this country, on land that you own in the Pacific Northwest, the ancient forests are falling at the rate of eighty-six football fields per day. Few are aware of this, for government policy provides for scenic corridors along the roads on which people drive. But beyond these corridors, devastation is occurring. The corridor foil is like the villages that a minister to Catherine the Great set up when she was to take a trip to the far flung parts of the Russian empire. The minister organized Potamkin villages: little false-front villages with people dancing and having fun. These villages became the view Catherine the Great had of her country as she travelled.

In the time it took me to read that last story, 45 seconds, 40.5 acres of tropical rainforest fell to the ground. That is 54 acres per minute (an area the size of 9 city blocks) or an area equivalent to 3,240 acres (540 city blocks) an hour.

Some date the modern environmental movement to the publication of Rachael Carson's book *Silent Spring* in the early 1960s. Others date it to the passage of the Freedom of Information Act of 1966, the Wilderness Act of 1964, the Wild and Scenic Rivers Act of 1968, the Endangered Species Act of the same year, or to the administrative hearings and litigation in 1967 against Consolidated Edison's plan to turn Storm King Mountain on the Hudson River into a giant hydroelectric battery. The incredible vision of the early appeals and litigation against DDT on Long Island and in Wisconsin in the late 1960s also comes to mind. All of these were important events.

But history moves by symbols and, increasingly, by photographs: President Kennedy lurching forward in an open automobile in Dallas, a police dog leaping at a black man in Alabama, a helicopter lifting the last American off an embassy rooftop in Saigon. These pictures signaled the end of an era of innocence, or perhaps the end of an era of guilt. In 1969, a photograph of a dead seabird on a beach at Santa Barbara, California, covered with thick, slimy, sticky, black oil seared the hearts of a nation. The seabird was killed by the Santa Barbara Oil Blowout, a rupture in one of the offshore oil platforms dotting the skyline along the scenic California coast. This rupture was not supposed to happen, and led to protests and to the formation of new groups like Get Oil Out or "GOO." The rupture also provided the nation with a symbol. By April, 1970, there were thousands of events all across this country on a single day; a day not contained on the commercial calendars then or since; a day not created by a vote in Congress but by millions of Americans, young and old, in their own hearts and in their own communities. That day was Earth Day, April 22, 1970.

Now, in 1989, on a remote and pristine beach at Green Island, Alaska, lie the dead, oil-soaked bodies of dozens of sea otters, potentially the precursors to the extinction of an entire race of sea otters in one of their remaining habitats. After twenty years of new laws, brilliant environmental scientists, clever economists, and crafty lawyers, what lies on the beach at Green Island are the shattered illusions of the American public. There is more on that beach as well: the lost respect of an angry world. We Americans, the people of one of the most "advanced" countries, have been telling the world that we can exploit its resources and protect its environment. To a large extent, we have been lying.

In the rain forests of eastern Brazil, the Kayapo know we are

lying. They know that the giant dams, financed by our lending through the World Bank, are putting the people of Brazil in hock to us for the privilege of flooding their rain forest with the world's largest artificial pond. And we have the temerity to demand that they pay a debt for such projects! Our "allies" have followed our example. In the incredibly rich jungle of northern Borneo, in the part of Malaysia called Sarawak, the Penan know the Japanese companies are lying. They know that, as their homes are cut down, as the giant trees are shipped to Japan to make such products as disposable chopsticks, not only are the trees being taken from them, but also the very soul of their culture.

We may ask, how does this affect us here in our comfortable surroundings? Environmental lawyers talk about sacrifice. Law students talk of difficult choices ahead of them upon graduation. Will they have a fine, rewarding career or will they make sacrifices? It is a question that every environmentalist who becomes a lawyer must ponder. These questions have implications different than one might first imagine. Ask the environmental lawyers who have come to this conference whether they think the last twenty years has been a sacrifice. The sacrifice, in my view, would be to hold the beliefs we do and to be unable to act on them, to have to work in some Manhattan high-rise trying to figure out how to keep the President of Exxon out of jail. The real sacrifice would be to understand one's ethical duty as a lawyer for a corporation or government and not be able to carry that duty out. What are some of those duties? The new Code of Professional Responsibility of the ABA suggests that "if a lawyer or an organization knows that an officer, employee, or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law which reasonably might be imputed to the organization," the lawyer should take certain actions:

- (1) seek reconsideration of the matter;
- (2) advise that a separate legal opinion be sought for presentation to the proper authority in the corporation;
- (3) refer the matter to higher authority in the organization, including the highest authority and, if necessary, resigning.

A lawyer for a government agency, according to these model rules, has similar duties. The Code says:

Although in some circumstances the client may be a specific agency, it is generally the government as a whole that is the client of a government lawyer. . . . Moreover, in a matter involving the conduct of government officials, a government lawyer may have authority to question such conduct more extensively than that of a lawyer for private organization in similar circumstances.

In the early years of the Environmental Protection Agency, we had such an ethic. I hope that ethic will be revived in the Environmental Protection Agency. The policy then was: if you did not believe it, you did not sign it. Lawyers had the same obligations that accountants and physicians do. *They were not merely to endorse what someone in the Agency wanted them to do and sign off on it.* They were to give their independent legal opinion. Even if someone in the General Counsel's office wanted a different opinion, you did not have to sign it if you disagreed with it. It could be bucked up the line. Finally, if the general counsel did not believe it, she would not sign it either.

Law students may ask in light of all the institutional problems they may face and all the environmental destruction, what is it that just one person can do? Edmund Burke wrote a long time ago that "nobody makes a greater mistake than he who did nothing because he could only do a little." There is an appropriate story from Malaysia for today's law students that reflects on choices individuals make.

Several young lawyers graduated from a leading law school in a nation. They went to foundations and they requested money to start a nonprofit environmental public interest law firm, which they then did. They brought various cases: pollution cases, environmental impact cases, and the like. One afternoon one of the lawyers was leaving early, when a couple of women came up the walk, as citizens and nonprofit groups often did to come seek advice or bring complaints. She greeted them airily and asked if she could help. One of the women said "I am sorry ma'am, but you will have to come with us. You are under arrest." Shock went through her system: Me? Why me? What have I done?

What she had done was practice public interest environmental law against a number of defendants, most significantly against a subsidiary of the Mitsubishi Corporation of

Japan because its subsidiary was dumping radioactive and toxic waste on the villagers in the small town of Bukit Merah, Malaysia. She brought the litigation, and the villagers involved had to walk five miles to the courtroom each day. They walked in pairs because three would have been an illegal assembly.

She was not the only one picked up. Over one hundred people were arrested. She was held for forty-seven days, thirteen of them in solitary confinement. She did not have access to a lawyer, no visitor was allowed to see her, no charges were filed, and no trial was conducted.

Malaysia is not an undeveloped country. It is a moderately developed country. It is a place of beautiful beaches, high-rises, and high-tech. British colonial rule left it with both a legal system and laws, such as the Internal Security Act under which the young attorney was arrested. These broad laws can be used in a rather dramatic fashion against public interest work.

I use the above story as one example of the "sacrifices" undertaken by public interest lawyers in other countries, but there are others. In Chile, for example, an environmental lawyer told me he was involved in litigation against the largest mining company in Chile, and he shrugged off the fact that the company is headed by an active duty military general. That is courage. He said, "Of course our phones are tapped. Of course our mail is opened. This is just what we do." In Brazil, Chico Mendez, who was not a lawyer but an activist rubber tapper, paid the ultimate price for attempting to protect his environment. He was murdered. Moreover, there are those who exist in countries where even to bring an environmental suit is only a dream. These environmentalists accept risks. I spoke with my friend in Malaysia about six weeks after she was released from jail. I needed her to send me some documents. I asked that she just drop them in the mail. She said, "Well, I will try to get around to it, but I am kind of busy right now. I have a court case next week." I asked what case was keeping her busy. She said, "The case against the Japanese company, back in court again. . . . If you censor yerself, you have no need of outside censors. If you start thinking of risks, you will do nothing." Lawyers and activists like that are special people.

In the world today, at least in the industrialized world, we seem to identify ourselves by our role in the economic structure and by our job title. Most of us think of ourselves as lawyers and

elsewhere people think of themselves as scientists, doctors, teachers, or plumbers. When it seems appropriate, like today, we put on little badges that say "environmentalist." That seems to me to be backwards. What we should be, what the planet needs us all to be, is environmentalists who wear badges describing ourselves as lawyers, doctors, or plumbers. If you have a place that is important to you, a place you know and love and are deeply committed to, you must work to defend it.

It might be said that there are not many jobs in public interest environmental law. That does not mean there is no work to do. It just means that nobody has found a way to do the work that needs to be done.

Will we have to put up with criticism and pressure to toe the line? Of course we will. Will we be discouraged from taking certain cases, particularly in certain law firms that we might join? It is easy to make a safe calculation at that point, going along to get along. After all, if we are only discouraged from representing an activist client, it is not worth quitting a well-paying job, is it? It is not as if they have put us in jail, is it? At that point, the lawyer with a conscience and ideals will have to stop and think real hard. It does not matter if they take you away or they take away what you want to do. The bottom line is that you have lost. Whether you lose your physical freedom, or your freedom to apply your craft, something vital has been taken away.

For all of us who practice law, the battles we are involved in are rarely physically present in our day-to-day reality. We sit in buildings like this. We talk about things very far away. Most of us spend our lives far from where a wolf, a spotted owl, a red-backed vole, or an Amazonian critter could transform our lives dramatically by calling our name. No one, you may say, is calling your name. But that is where you are wrong. There is a voice calling your name. It is the howling of chain saws as they bring down yet another old-growth Douglas Fir: one that started growing before William the Conqueror invaded England, or one that started growing before Columbus came to these shores, or hundreds that were growing—just to bring it back to law—before the Constitution was signed. While we have been talking, while we have been perusing the ins and outs of environmental law and philosophy for the last half of the day, somebody else has been working—and working very hard! As long as there are chain saws screaming in the old growth of the Pacific Northwest and in the rain forests of the tropical countries, someone is calling your

name.

Earlier in this century, Aldo Leopold recognized the need for a clearly enunciated basis for ecological thought and coined the term "thinking like a mountain." Apparently his experience with the wolf, a species all but gone from the continental United States, was a pivotal point in the evolution of this concept. Few of us have been lucky enough to hear the call of a wolf ringing down the mountain slopes. We are all fortunate that Aldo Leopold preserved this experience in the pages of his book *A Sand County Almanac*.

A deep chesty bawl echoes from rimrock to rimrock, rolls down the mountain, and fades into the far blackness of the night. It is an outburst of wild defiant sorrow, and of contempt for all the adversities of the world. . . . Those unable to decipher the hidden meaning know nevertheless that it is there, for it is felt in all wolf country, and distinguishes that country from all other land. It tingles in the spine of all who hear wolves by night, or who scan their tracks by day. Even without sight or sound of wolf, it is implicit in a hundred small events: the midnight whinny of a pack horse, the rattle of rolling rocks, the bound of a fleeing deer, the way shadows lie under the spruces. Only the ineducable can fail to sense the presence or absence of wolves, or the fact that mountains have a secret opinion about them. . . . My own conviction on this score dates from the day I saw a wolf die. . . . In those days we had never heard of passing up a chance to kill a wolf. In a second we were pumping lead into the pack, but with more excitement than accuracy: how to aim a steep downhill shot is always confusing. When our rifles were empty, the old wolf was down, and a pup was dragging a leg into impassible slide-rocks. . . .

We reached the old wolf in time to watch a fierce green fire dying in her eyes. I realized then, and have known ever since, that there was something new to me in those eyes—something known only to her and to the mountain. I was young then, and full of trigger-itch; I thought that because fewer wolves meant more deer, that no wolves would mean hunters' paradise. But after seeing the green fire die, I sensed that neither the wolf nor the mountain agreed with such a view. . . .

We all strive for safety, prosperity, comfort, long life, and

dullness. The deer strives with his supple legs, the cowman with trap and poison, the statesman with pen, the most of us with machines, votes, and dollars, but it all comes to the same thing: peace in our time. A measure of success in this is all well enough, and perhaps is a requisite to objective thinking, but too much safety seems to yield only danger in the long run. Perhaps this is behind Thoreau's dictum: In wildness is the salvation of the world. Perhaps this is the hidden meaning in the howl of the wolf, long known among mountains, but seldom perceived among men.